

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 29, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-2339

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

COUNTY OF JEFFERSON,

PLAINTIFF-RESPONDENT,

v.

MARK L. GUTTENBERG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County: JACQUELINE R. ERWIN, Judge. *Affirmed.*

DEININGER, J.¹ Mark Guttenberg appeals a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant (OMVWI) and with a prohibited alcohol content (PAC). Guttenberg claims the arresting officer did not have the reasonable suspicion required for a traffic stop

¹ This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

and that the evidence obtained as a result of the stop should have been suppressed. We disagree and affirm.

BACKGROUND

The facts are not in dispute, inasmuch as the parties stipulated in the trial court that Guttenberg's motion to suppress could be decided based on the contents of the arresting officer's report, a summary of which follows.

At approximately 3:00 a.m. on October 7, 1995, Jefferson County sheriff's deputies and a state trooper were advised by dispatch that a truck driver had called in a report of a red Blazer "traveling at a high rate of speed and weaving in and out of traffic" on I-94. The informant "believed the driver of the vehicle was possibly intoxicated." The state trooper entered the interstate at STH 26 and informed deputies that he had observed a red two-door Blazer traveling southbound on STH 26. A short time later, the trooper further advised that he had contacted the reporting truck driver who said that the vehicle the trucker had called in about had exited the interstate on STH 26 southbound.

A Jefferson County deputy located the vehicle on STH 26 and followed it to observe its driving. As she did so, the vehicle utilized "its entire lane from the white edge stripe to the center line," and it crossed "the white edge stripe two times" as it continued to weave in its traffic lane. The deputy stopped the vehicle, identified the driver as Guttenberg and asked him if he had been drinking. Guttenberg said that he had been, and the deputy could smell the odor of intoxicants on his breath. Following the administration of field sobriety tests and a preliminary breath test, the deputy arrested Guttenberg for OMVWI. He was transported for the taking of a blood test for alcohol content, and he was subsequently also cited for PAC.

Guttenberg moved to suppress the blood test results on the grounds that, among other things, the deputy lacked reasonable suspicion for the traffic stop. He withdrew his motion to the extent it was based on grounds other than a lack of reasonable suspicion for the stop, and the trial court denied the motion grounded on the allegedly improper traffic stop. Following a court trial on stipulated evidence, the court found Guttenberg guilty of both offenses. He appeals the judgments of conviction in both cases, which were consolidated for purposes of this appeal.²

ANALYSIS

When reviewing a trial court's determination regarding the suppression of evidence, we will uphold the trial court's findings of fact unless they are against the great weight and clear preponderance of the evidence. *State v. Richardson*, 156 Wis.2d 128, 137, 456 N.W.2d 830, 833 (1990). However, whether an investigative stop meets statutory and constitutional standards is a question of law which we review de novo. *State v. Krier*, 165 Wis.2d 673, 676, 478 N.W.2d 63, 65 (Ct. App. 1991).

Under *Terry v. Ohio*, 392 U.S. 1, 27 (1968), the police must possess sufficient information to form a reasonable suspicion of illegal activity to justify

² At the beginning of the hearing on Guttenberg's suppression motion, his counsel informed the trial court that "we had almost the exact same issue" in the "Leslie Crook" case, and that the facts there were "strikingly similar." The trial court had previously denied Crook's suppression motion challenging a traffic stop and we later affirmed. *County of Jefferson v. Crook*, No. 96-1635, unpublished slip op. (Wis. Ct. App. Nov. 7, 1996). We agree with the statements of Guttenberg's counsel that the facts of that case and the issue there presented are nearly identical to those present here, as are the arguments of counsel on appeal. The two cases also involved the same plaintiff, defense counsel and trial court, and both were coincidentally submitted to the same member of this court for review. While we do not rely on *Crook* as precedent, *see* § 809.23(3), STATS., we acknowledge that our present analysis closely follows that set forth in our prior opinion.

an investigative stop. Reasonable suspicion must be based on “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion.” *Richardson*, 156 Wis.2d at 139, 456 N.W.2d at 834 (quoting *Terry*, 392 U.S. at 21). Reasonableness is measured against an objective standard, taking into consideration the “totality of the circumstances.” *Id.* at 139-40, 456 N.W.2d at 834-35. It is “a common sense question, [one] which strikes a balance between the interests of society in solving crime and the members of that society to be free from unreasonable intrusions.” *State v. Jackson*, 147 Wis.2d 824, 831, 434 N.W.2d 386, 389 (1989).

Guttenberg argues that the deputy who arrested him lacked the requisite reasonable suspicion that an offense had been or was being committed. In its bench decision, the trial court concluded that it was reasonable for the deputy to rely, in part, on the information provided by the reporting truck driver. The court found that the trucker had “made a face-to-face report to a police officer” based on the fact that the state trooper made contact with the trucker following receipt of the trucker’s initial telephone tip. Guttenberg attacks this finding. He notes that the deputy’s narrative report does not specify whether she received the information that the trooper had made personal contact with the reporting truck driver prior to or after stopping Guttenberg. Thus, he argues we must treat the information from the trucker as an “anonymous tip.”

The County argues that it is apparent from the deputy’s narrative report that it is written chronologically, thus supporting the trial court’s inference that the deputy had received the trooper’s report of his contact with the trucker prior to stopping Guttenberg’s vehicle. We agree. Guttenberg stipulated that the trial court should decide his motion based solely on the deputy’s written report. He therefore waived his opportunity to cross-examine the deputy and to present

evidence in support of his motion. Guttenberg may not now complain of proper inferences the trial court drew from the written report.

Moreover, even if the trucker had remained “anonymous,” we would sustain the denial of Guttenberg’s motion. Ordinarily, an anonymous tip is not enough, by itself, to constitute reasonable suspicion of criminal activity. *Alabama v. White*, 496 U.S. 325, 329 (1990). However, the corroboration by police of the innocent details of an anonymous tip may, under the totality of the circumstances, give rise to reasonable suspicion. *Richardson*, 156 Wis.2d at 142, 456 N.W.2d at 835. The corroborated actions of a suspect “need not be inherently suspicious or criminal in and of themselves.” *Id.* Rather, the cumulative facts, “along with reasonable inferences and deductions which a reasonable officer could glean therefrom, is sufficient to supply the reasonable suspicion that crime is afoot . . . and to justify the stop.” *Id.* Further, the circumstances of the tip itself may provide “indicia of reliability” sufficient to justify the stop. *See White*, 496 U.S. at 328.

Guttenberg argues that the tip lacked both corroboration by the deputy and indicia of reliability. We disagree. The deputy, after proceeding to the area reported by the truck driver, came across a vehicle matching the description provided by the trucker. Further, a vehicle matching that description had been observed by a fellow officer as it left the interstate at the exit reported by the trucker. The trucker’s accurate description of the red Blazer, and of its location and point of exit, indicates that the trucker had an opportunity to observe Guttenberg’s driving, giving rise to some indicia of reliability. Further, the deputy followed Guttenberg and observed his uneven driving, consisting of two instances in which he crossed over the white shoulder line. The deputy’s observations corroborated the trucker’s report of Guttenberg’s erratic driving.

We conclude that the initial tip describing Guttenberg's vehicle as "weaving in and out of traffic," combined with the deputy's observations, constituted sufficient information for the deputy to form a reasonable suspicion that Guttenberg was OMVWI.

Guttenberg also argues that because crossing the shoulder line "does not constitute an offense in Wisconsin," the deputy could not possess a reasonable suspicion that he was driving while intoxicated. The fact that the deputy did not observe a traffic violation by Guttenberg is irrelevant on these facts. The deputy did not base her stop on an observed violation of a separate traffic law; rather, she suspected Guttenberg was OMVWI, based on the tip and her own observation of Guttenberg's driving. As we noted in *Krier*, 165 Wis.2d at 678, 478 N.W.2d at 65, "[s]uspicious activity justifying an investigative stop is, by its very nature, ambiguous." An officer has the right to temporarily detain an individual for the purposes of inquiry "if *any* reasonable inference of wrongful conduct can be objectively discerned." *State v. Anderson*, 155 Wis.2d 77, 84, 454 N.W.2d 763, 766 (1990) (emphasis added).

Finally, we note that we have previously held that where the potential crime involves a dangerous ongoing activity, the lack of alternative means available to the officer to investigate, short of making the stop, is a consideration in determining reasonableness. See *State v. King*, 175 Wis.2d 146, 154, 499 N.W.2d 190, 193 (Ct. App. 1993). Requiring the deputy to further investigate the situation by allowing a potential drunk driver to continue driving could seriously endanger public safety.

We conclude that under the totality of the circumstances, the stop was justified. Accordingly, we affirm the judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.

